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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. 356

STEPHEN ROBLEY EVANS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

STEPHEN ROBLEY EVANS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1970; Petition for Rehearing denied June 5, 1970. See Appendix B to this Petition.

The Petition for Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Constitutional questions are presented, involving both the First and Fifth Amendments: May an administrative agency validly promulgate a regulation [32 C.F.R. § 1625.2] that creates a deadline for filing information of a new status (in this case a status involving religion and conscientious belief) despite the absence of any time limitation set by the Act of Congress?

This was raised in the trial court, by Motion and in the Court of Appeals, by briefing.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2 and § 1622.30. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Evans with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

Evans pleaded "not guilty" and was tried by the Honorable Charles H. Carr, District Judge, sitting alone without a jury. He was found guilty and given a five year sentence.

6. THE FACTS

The facts are found in the complete Selective Service System file of the appellant.[1]

Petitioner registered with the Selective Service System [Ex. 1]. He was classified II-S while in college. He was reclassified I-A and on September 27, 1966 was sent an order to report for induction. His "acceptability" being undetermined he then asked the board for SSS Form No. 150 Special Form for Conscientious Objector which he filled out and promptly returned [Ex. 13].

As the Court of Appeals, in its opinion, put the facts on this phase of his processing:

> "The selective service file shows that Evans requested an SSS Form 150 (Conscientious Objector) on March 9, 1967. At that time he was subject to a prior order to report for induction. Form 150 was completed and presented to the board on March 15, 1967. The board, after considering the material submitted in the form, again classified Evans I-A. Evans was granted a personal appearance by the local board and thereafter appealed his classification to the state appeal board. On both occasions Evans was classified I-A." [p. 4 slip opinion].

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1. This file, Government's Exhibit 1, is pencil paginated at the bottom of each sheet and is hereafter referred to by sheet number.

As the record shows:

1. His Special Form made out a prima facie case, based on the standard of *Welsh* v. *United States*, ... U.S. ..... (June 15, 1970) See Ex. 71-76.

2. He submitted letters from professors, and others attesting to his sincerity. See Ex. 80-86.

He was given an opportunity to meet the local board but (1) was refused the opportunity to use two witnesses he had brought and (2) was jibed at when he answered the questions on self-defense "Oh, you'd just maim him." See Ex. 108-109.

He volunteered (on Form No. 151) for civilian work but his offer was rejected [Ex. 14]. Upon again being ordered to report for induction he refused to submit and prosecution followed [Ex. 15].

7. REASONS FOR GRANTING WRIT

A national decision is required on the constitutional problems present, ones that involve whether the Act of Congress giving conscientious objectors a draft status, and without time limitation for presentation, may be thwarted by an administrative regulation that creates a deadline for presentation of a new status.

Also involved is a consideration of the "in limbo" problem where one agency (the Selective Service System) will not consider a claim of new status presented to it after its deadline, the Order to Report for Induction, and the regulation of another linked-in-the-processing agency (the United States Army) will "not entertain" an application for separation, based on the status of conscientious objection, where such status had been presented to the Selective Service System.

8. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to

any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark,* 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud,* 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering,* 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this,

but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim, for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . . ." [DoD Directive No. 1300.6]

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regard to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *Seeger* v. *United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

Although we are not here dealing with an "all fours" *Ehlert*-type situation the rationale is much the same: the conflict between the "open-end" Act of Congress and the deadline setting agency regulation.

The majority opinion in the "controlling" case, *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert*, Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j), provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 391, 80 L.Ed. 528 (1936); *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[2] *Youngstown Co.* v. *Sawyer,* 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

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2. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page 333, *Ehlert* v. *United States*, 9 Cir., 1970, 422 F.2d 332.

One not listed gives the rationale well:

The facts of it are that on January 29, 1951, a registrant named Clark mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction [p. 614].

The opinion says:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal

does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted." *United States* v. *Clark,* W.D.Pa., 1952, 105 F.Supp. 613, 615.

III

The Sixth Amendment Right to Counsel Applies to Administrative Proceedings in the Selective Service System

The regulations of this administrative agency forbid the registrant to bring his attorney to his meeting with the board. 32 C.F.R. § 1624.1(b).

A very recent case supports our contention that denial of counsel violated petitioner's rights:

United States v. *Weller,* No. 42614 (N.D.Calif., Sept. 19, 1969) 2 SSLR 3229.

Referring to Selective Service Regulation 1624.1(b), which states, ". . . no registrant may be represented before the local board by anyone acting as attorney or legal counsel." Judge Peckham declared in *United States* v. *Weller* (at 2 SSLR 3231) that the denial of the right of counsel was not authorized by Act and that the registrant

had a right to counsel at his personal appearance before his board. Judge Peckham stated, "Accordingly this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional." 2 SSLR 3229 at 3231.

It is submitted that petitioner was prejudiced by said denial of counsel, that his constitutional rights were violated by the action of the local board. A thorough analysis of this position is accomplished by Judge Peckham's opinion in *Weller.*

IV

Refusal of the Local Board to Hear Defendant's Proffered Witnesses Was a Violation of the Right to a Fair Hearing

" 'Due process' is a procedure which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial [or fair hearing]." *Sexton* v. *Barry,* 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed. 2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property. U.S.C.A., Const. Amend. 5; *U. S.* v. *Kuwabara,* 56 F.Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A., Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.,* 40 F.Supp. 436. In regard to "due process," it should be pointed out that the constitutional provision for security of person and property should be liberally construed. U.S.C.A., Const. Amends. 4, 5; *U. S.* v. *Wheeler,* 149 F.Supp. 445.

We submit that fairness and justice require that the local board grant the registrant a full and fair hearing on

his claim. Evidence which has bearing on a registrant's claim should not be excluded.

In the present instance it was essential to a full and fair hearing that his two witnesses be permitted to appear before the local board.

The value of a personal appearance before a local board for one claiming a I-O classification is beyond need of argument. So also is the value of the hearing being fair when the registrant has been granted said personal appearance. *Simmons* v. *United States,* 348 U.S. 397 (1955).

The local board was guilty of an abuse of discretion and demonstrated its arbitrariness, when without reason it denied appellant the right to present witnesses vital to proof of his claim.

There are three unreported cases that support this position. Their rationale is persuasive. Two are annexed as Appendices D and E. The third, a very recent one, is *United States* v. *Molchak,* C.D. Calif. No. 4691, Feb. 2, 1970. Here Judge Jesse W. Curtis said:

> "THE COURT: Gentlemen, in this case it seems to me that the registrant's statement of his basis for a conscientious objector status is prima facie sufficient.
>
> It would seem to me that if it were to be denied, the only basis, if ever, for denying it would be one of two grounds:
>
> One would be a lack of training which seems to be the basis upon which the Board turned it down. They seemed to think there was a lack of religious training here.
>
> The other one is possibly his insincerity.

> Taking the last one first, it seems to me the Board cannot rely upon insincerity in a case where the registrant has appeared for a hearing with witnesses who are there to testify for his sincerity or as to his insincerity. If that were the question it would seem to me the Board is duty bound to listen to his witnesses in that regard, and when they do not they are therefore foreclosed from refusing his classification as a CO on that ground."

We submit that Evans' right to a fair hearing was violated by the action of the local board in excluding his witnesses.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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July 5, 1970.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

STEPHEN R. EVANS,
Appellant.

No. 24,451

[April 30, 1970]

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Before: ELY and CARTER, Circuit Judges, and JAMESON,* Senior District Judge.

JAMES M. CARTER, Circuit Judge:

Evans was indicted for violation of the Universal Military Training and Service Act, 50 App. U.S.C. § 462, for his refusal to be inducted. He waived jury, was convicted and appeals. We affirm.

Evans' opening brief raised two basic contentions:

(1) The order to report for induction was invalid; but if on the other hand, the order was valid, he had no continuing duty to report.

(2) Evans' constitutional rights were violated in the denial of his requests to have an attorney present and to call witnesses at his hearing before the draft board.

---

*Hon. William J. Jameson, Senior District Judge, District of Montana, sitting by designation.

New counsel filed Evans' reply brief and raised an additional contention, that Evans submitted a prima facie case for a I-O classification and the board should have so classified him.

I

THERE WAS A VALID ORDER TO REPORT FOR INDUCTION AND REGISTRANT WAS UNDER A CONTINUING DUTY TO REPORT.

The Selective Service file received in evidence below shows that Evans was originally ordered to report for induction October 26, 1966. Prior thereto on August 22, 1966, he had been ordered to report for a physical examination. A Statement of Acceptability (DD Form 62) dated September 2, 1966, finding him fully acceptable for induction, was mailed to him on September 21, 1966. The actual induction was not completed pending "clearance of . . . records." The clearance reaffirmed that Evans was fully acceptable and he was so notified.

Subsequently on February 27, 1968, Evans was duly ordered to report for induction on March 27, 1968. On March 19, 1968, he was ordered to report to the Examining Station for further processing, and on March 29, 1968 was again found fully acceptable for induction. On May 28, 1968 Evans was informed by letter that he was still "under this original order" of February 27, 1968 and was ordered to report for induction on June 18, 1968. Evans was not confused or mislead. He reported on June 18, 1968 but refused to be inducted. The prosecution and conviction were based on this refusal.

Evans first complains that a Statement of Acceptability (DD Form 62) was not mailed to him 21 days prior to his induction date. 32 CFR § 1631.7(a) requires such mailing.

Evans' Selective Service file indicates that between September 2, 1966 and June 18, 1968, a variety of challenges to Evans' acceptability were raised. However, the Statement of Acceptability of September 2, 1966, mailed to Evans on September 21, 1966 was never retracted. In such a situation only one Statement of Acceptability need be mailed to the registrant. It therefore appears Evans knew of his acceptability over a year before the receipt of the February 27, 1968 order to report.

Evans is unable to provide any authority to support his contention that the March 19, 1968 order to report to the Examining Station for further processing somehow invalidated the earlier valid Statement of Acceptability. This action was within the discretion of the local board and was not violative of any selective service regulation. We therefore find that on February 27, 1968 Evans was issued a valid order to report for induction.

Evans next contends that the May 28, 1968 letter did not validly revive the February 27 order to report one month later. In support of this position, Evans cites 32 CFR 1632.14(a).

That section provides in part, "If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains." (As to the continuing duty to report, *United States v. Prince*, (2 Cir. 1968) 398 F.2d 686; cert. denied 393 U.S. 946 (1968);

Kariakin v. United States, (9 Cir. 1958) 261 F.2d 263.) Nothing in the regulations suggests that a new order is required. 32 CFR 1632.2(d) specifically provides that no new order is required in cases of formal postponements.

Evans seeks support from 32 CFR 1632.2. The section provides for postponement of induction in certain cases of personal or family illness. A formal postponement procedure is established. Evans contends that a postponement of induction may only take place pursuant to these provisions. We do not so read the regulations.

II

REGISTRANT WAS NOT ENTITLED TO AN ATTORNEY NOR TO WITNESSES AT THE HEARING BEFORE THE BOARD.

32 CFR 1624.1(b) provides in part, ". . . [N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." We have held that the proceeding before the board is non-judicial and non-criminal. There is no justification to extend the right to counsel to such proceedings. *Haven v. United States,* (9 Cir. 1968) 403 F.2d 384, cert. denied 393 U.S. 1114 (1969). Other Circuits have so held. *Nickerson v. United States,* (10 Cir. 1968) 391 F.2d 760, cert. denied 392 U.S. 907 (1968); *United States v. Capson,* (10 Cir. 1965) 347 F.2d 959, cert. denied 382 U.S. 911 (1965); *Imboden v. United States,* (6 Cir. 1952) 194 F.2d 508, cert. denied 343 U.S. 957 (1952).

32 CFR 1624.1(b) provides in part, "No person other than a registrant shall have the right to appear in person before the local board . . .". Since the proceeding is non-judicial in nature, the registrant is not entitled to have witnesses testify in his behalf. *United States v. Nugent,* (1953) 346 U.S. 1, 8; *Uffelman v. United States,* (9 Cir. 1956) 230 F.2d 297, 303.

THERE WAS NO ERROR IN DENYING REGISTRANT A I-O CLASSIFICATION

At oral argument Evans' new counsel raised the contention that there was no basis in fact for the local board's decision to classify Evans I-A in view of his having made a prima facie case as a conscientious objector. This contention had been only briefly alluded to in prior appellate proceedings.

The selective service file shows that Evans requested an SS Form 150 (Conscientious Objector) on March 9, 1967. At that time he was subject to a prior order to report for induction. Form 150 was completed and presented to the board on March 15, 1967. The board, after considering the material submitted in the form, again classified Evans I-A. Evans was granted a personal appearance by the local board and thereafter appealed his classification to the state appeal board. On both occasions Evans was classified I-A.

The ultimate question in a registrant's claim for conscientious objector classification is his sincerity in objecting on religious grounds to participation in war in any form. This is purely a subjective question. *Witmer v. United States,* 348 U.S. 375, 381 (1955). Any fact which casts doubt on the veracity of the registrant is relevant and is affirmative evidence that he has not painted a full and accurate picture. *Witmer,* supra, 381-82.

When Evans filled out his original questionnaire in 1962, in the section concerning conscientious objection, he had written "Does not apply." When he was first ordered to report for induction in 1966 he raised no conscientious objection claim, but only requested a postponement of induction.

From his SS 150 and his interview with the board, the board could rightfully have concluded and did so conclude

that Evans was raising only his personal and moral objections to war, not ones based on religious training or belief, as defined in *United States v. Seeger,* 380 U.S. 163 (1965). Evans, in his SS 150, stated his belief was "the result of 24 years of experience and exposure and is a conclusion that takes into account all things to which I have been exposed (as is common with any religious belief)". There was no claim of religious training. At his hearing he admitted he would use force in certain circumstances. His summary of his appearance before the board sent in by letter, stated that "life is the one sacred entity and that it must be preserved at all costs . . . War destroys life." Evans' credibility and demeanor were for the board to pass on. *White v. United States,* (9 Cir. 1954) 215 F.2d 782, cert. denied 348 U.S. 970 (1955).

In conclusion, we find no error by the board that would require reversal of Evans' conviction. The judgment is Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, June 5th, 1970

Before: ELY and CARTER, Circuit Judges, and
JAMESON, Senior District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed May 12, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Service Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1961)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

8173

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KEITH NORMAN GLESSING,
Defendant.

Minneapolis, Minnesota, November 30, 1951.
Before Judge Matthew M. Joyce.
G. Frandle, Reporter.

THE COURT: I am obliged to you gentlemen, both of you, for the conduct of the trial of this case which hasn't taken very long. You have supplied me with material and information and knowledge which I think will be of benefit to me always.

* * *

I don't think there was any misrepresentation at all and I think that while it isn't for me to determine what the preponderance of the evidence may be, I can't avoid that feeling that it looks to me as though there was a misconception. Take that for what it is worth. Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already

told the Board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the Board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the Board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the Board doesn't know or didn't know because the Board wouldn't proceed to hear them.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

No. 32,390

UNITED STATES OF AMERICA

VS.

WALTER KOBIL,
Defendant.

Transcript of proceedings on direction of verdict in the above entitled cause before Hon. FRANK A. PICARD, District Judge, at Detroit, Michigan, on Thursday, September 13, 1951.

APPEARANCES:

Kenneth W. Smith, Assistant United States Attorney, Appearing on behalf of the United States.

Hayden C. Covington and Harold E. Leithauser, Appearing on behalf of the Defendant.

Detroit, Michigan. Thursday, September 13, 1951. 9:30 o'clock A. M.

* * *

We come down to today, and they classify him not as a conscientious objector. What they classified him on in the first place, I don't know; there isn't anything in that file so far as I know that placed him in anything except being a conscientious objector at that point.

But that is sort of a temporary classification. He has got ten days in which to say, "Well, I want to be heard." He said he wanted to be heard. He came down there with two witnesses. They wouldn't let his witnesses in.

That was wrong, unless it appeared that his witnesses were creating some kind of a disturbance or were there for the purpose of preaching Jehovah's Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and unAmerican. The boards might as well find it out now as at any time.

Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with

this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.

* * *

But it was absolutely without any basis in fact and there was no right for this draft board to classify him as 1-A. What they should have done, in my opinion, is to have made further inquiry that gave them that right. There is nothing I have here to show and nothing they have that shows it if they did.

He is a conscientious objector. The worst he should have gotten from his angle was to have been classified for non-combatant service as a conscientious objector. If he was a conscientious objector, no matter what they found, they could have classified him as a conscientious objector and could have classified him for non-combatant service.

Therefore, I instruct this jury to find a verdict of not guilty.

You will take the verdict.

(Verdict taken.)

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 356

STEPHEN ROBLEY EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted for failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). On April 21, 1969, he was sentenced to imprisonment for five years (R. 66).[1] The court of appeals affirmed (Pet. App. A).

Petitioner's Selective Service file[2] shows that he first registered in July 1960 on attaining the age of

[1] "R" references are to the record on appeal.

[2] We are filing with the Clerk of this Court a copy of petitioner's Selective Service file, to which we refer here as "F."

400-625—70

18 (F. 2). After leaving college in the spring of 1966, he was reclassified I–A, found physically acceptable, and ordered to report for induction on October 26, 1966 (F. 38, 40–42). Petitioner's induction was held in abeyance, however, pending security clearance [3] and petitioner was informed that he would be notified ten days in advance of a new reporting date (F. 49, 51, 57).

On December 21, 1966 and March 9, 1967, petitioner asked for and received SSS Form 150 to assert a claim to conscientious objector status (F. 52, 53, 59). The Board received his completed SSS Form 150 on March 15, 1967 (F. 71). In his answers, petitioner claimed to be opposed to participation in war in any form since it inevitably is life destroying (F. 73). This belief, although admittedly not based on organized religious teachings, was said to be based on experience and exposure in life "as is common with any religious belief" (F. 72).[4] Petitioner gave further expression to his belief in a number of written communications with the Board (F. 109, 119, 158). Letters, including one from the petitioner's parents who

[3] Petitioner had apparently "qualified" his security clearance form D.D. 98; that is, he listed membership or association with organizations necessitating clearance (Transcript of trial at "T." 40).

[4] Petitioner indicated in the form that he believed in an entity which directs man towards a harmonious being and a love of life, and that to destroy or even injure life would be to act in direct discordance with this entity (F. 71, 73). Petitioner described his belief in force as only that necessary to restrain "when there is absolutely no other alternative available" and asserted that war is not an example of the use of restraining force since "no war * * * need have [been] begun" (F. 72–73).

disagreed with him, were submitted. All attested to his sincerity (F. 80, 83, 85, 91). The Board retained petitioner's I–A classification and he was granted a personal appearance.

On July 9, 1967, two days prior to his personal appearance, petitioner submitted a letter to the Board to be included in his file. It indicated that he had made a request that counsel be allowed to appear with him before the Board and he had been informed by a clerk that he must appear alone (F. 100). He did so, and after the personal appearance summaries of the hearing were prepared by both the Board and the petitioner (F. 104, 108).

According to the Board summary, petitioner stated that his belief was a religious one, "that life is a sacred entity." He was asked if he belonged to an established religion and replied in the negative. He was told that the Board could order civilian work only if "his beliefs [were] religious, not personal." He indicated to the Board that he felt he came within this Court's ruling in *United States* v. *Seeger,* 380 U.S. 163 (F. 104–105). Petitioner's summary generally agreed with that of the Board, except petitioner quoted the Board members as stating that the reason he was not to be given an I–O classification was that he did not belong to any established religion (F. 108–109). Both summaries also reflected that petitioner brought with him two persons whom he wanted to appear as witnesses on his behalf. The Board refused to hear them, indicating that witnesses "were not necessary as the registrant was under oath and could

answer all questions" (F. 105). The two individuals subsequently filed letters attesting to the nature and sincerity of petitioner's beliefs (F. 112, 115–116).

Following the interview, the Board voted the same day to reject petitioner's claim and to classify him I–A (F. 106–107). Petitioner was permitted to appeal this classification (F. 119) and the Appeal Board unanimously affirmed the classification on September 21, 1967 (F. 123).

On September 26, 1967, petitioner submitted a letter to the local board requesting an interview with the medical review officer (F. 124) on the question of the disabling effect of an old injury (F. 130). In May 1968, after an examination, he was notified that he had been found fit for induction, and he was ordered, on the basis of an outstanding induction notice, to report for induction on June 18, 1968 (F. 154). He then sought classification as a student, claiming he was enrolled for a university summer session (F. 155). His request was denied. On June 18, 1968, petitioner reported for but refused to submit to induction. His prosecution followed.

1. Petitioner contends that under *Welsh v. United States,* No. 76, O.T., 1969, decided June 15, 1970, and *United States v. Seeger,* 380 U.S. 163, he was erroneously denied classification as a conscientious objector. He also argues that Selective Service regulation 32 C.F.R. 1624.1(b)—which permits witnesses to appear on a registrant's behalf in the discretion of the local board and forbids a registrant to be represented by counsel before the local board—is unconstitutional.

These contentions presuppose that petitioner is entitled to raise and to have the local board consider a claim to conscientious objector status made for the first time after the mailing of a notice to report for induction under 32 C.F.R. 1625.2. In *Ehlert* v. *United States,* No. 120, this Term, certiorari granted, May 4, 1970, there is presently pending before the Court the issue whether the alleged maturation of conscientious objector beliefs is a circumstance so "beyond the control" of a registrant as to permit local boards on receipt of a SSS Form 150 to reopen a classification once a notice of induction has been mailed. If (as the government there urges) this Court in *Ehlert* affirms the judgment of the Ninth Circuit that a claim to conscientious objector status cannot under the regulations be entertained for the first time after a notice of induction has been mailed, and that the regulation as so construed is valid, that decision would be dispositive of the present petition.[5] We suggest, therefore, that the Court should postpone disposition of this petition until *Ehlert* is decided. If the government's position as to the regulation is sustained in *Ehlert,* the petition in this case should be denied.

[5] This case differs from *Ehlert* in that here the local board decided petitioner's conscientious objector claim on the merits and petitioner was permitted to appeal that denial to the appeal board. Compare *United States* v. *Gearey,* 368 F. 2d 144, 150–151 (C.A. 2), certiorari denied, 389 U.S. 959. Assuming, however, that under *Ehlert* the Selective Service System was not authorized to reopen petitioner's classification, the consideration his claim received was in effect a benefit to which he was not entitled.

2. Should the Court decide in *Ehlert* that local boards must entertain conscientious objector claims received after the mailing of an induction notice, it would then be necessary to consider the contentions made in this petition. However, the question as to the constitutionality of the regulation prohibiting counsel from appearing with a registrant before a local board is currently before this Court in *United States* v. *Weller,* No. 77, this Term, question of jurisdiction postponed to the merits, March 23, 1970, 397 U.S. 985. It would, therefore, seem appropriate for this Court to defer disposition of the instant petition pending the outcome of *Weller*. If the merits in *Weller* are reached, the Court's treatment of the right-to-counsel aspect of the regulation would also seem pertinent to (albeit perhaps not controlling of) the separate contention raised here as to the right-to-present-witnesses branch of that same regulation. See *United States* v. *Nugent,* 346 U.S. 1.

3. Finally, with respect to the claim that petitioner was improperly refused a conscientious objector classification, the fact that petitioner's beliefs may not have had a "religious" foundation appears, under the *Welsh* decision last Term, no longer to be determinative. Nor in our view is this a case like *Capobianco* v. *Laird,* 424 F. 2d 1304 (C.A. 2), where the local board *specifically found,* largely on the basis of the registrant's demeanor and conduct at his personal appearance, that he was insincere.

There is, however, ample support for the Selective Service System's denial of petitioner's claim to conscientious objector status. For, we do not have here a claim premised on beliefs that had first matured *after* the notice of induction had been mailed to petitioner. See 32 C.F.R. 1625.2(b). To the contrary, petitioner's form (submitted March 15, 1967) indicated that his belief "is the result of 24 years of experience and exposure"; also he stated that he had "for some time now, refrained from saluting the flag of the United States of America or from paying homage to the United States in any way * * *." (F. 72). In addition, a letter from an individual who stated that petitioner had been her best friend for nearly two years indicated that he had "always spoken against violence and discouraged it in others" (F. 85). A similar letter from a friend who had known petitioner for six years contained no intimation that petitioner's conscientious objector beliefs were newly derived (F. 80–81).

As we pointed out in our Memorandum in *Posner* v. *United States,* No. 151, this Term, despite the divergence of views in the circuits on the *Ehlert* issue, the courts of appeals are uniform in holding that when a timely claim for conscientious objector status is not made, the exemption may be denied on that basis alone. See, *e.g., United States v. Gearey,* 379 F. 2d 915, 918 (C.A.2). Here there was ample basis for concluding that although petitioner may have held qualifying conscientious objector views, those views

had not changed following the mailing of the notice to report for induction. Accordingly, further review of his classification is not warranted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT, U.S.
FILED
JUN 7 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 356

STEPHEN ROBLEY EVANS, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 141

JOSEPH ROBERT STEVEN BROSSARD, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 142

MICHAEL KENNETH HARRIS, *Petitioner*,

vs.

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No. 145

BRIAN RANDOLPH FLESCH, *Petitioner*,

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vs.

UNITED STATES OF AMERICA, *Respondent*

No. 151

MOSS DAVID POSNER, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

No. 284

PETER AUGUSTUS BENDER, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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Los Angeles, California 90012
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

Come now the petitioners, by their attorney, and file this, their consolidated Petition for Rehearing of the Orders heretofore entered by this Court denying each of their petitions for a writ of certiorari.

Subsequent to the filing of each of the Petitions for a Writ of Certiorari this Court held in abeyance decision on each of these pending decision in *Ehlert* v. *United States,* No. 120 October Term, 1970. The Solicitor General recognized, in the Memorandum For The United States In Opposition he filed in each case, that the petitioner presented a question sufficiently similar to *Ehlert* to warrant deferring action.

Ehlert was decided April 21, 1971

On May 17, 1971 the Court made an order, in each of the seven petitioners' cases, denying certiorari.

Petitioners respectfully represent to the Court that the decision in *Ehlert* is based on an improvident evaluation of the controlling fact and petitioners believe that the Court will welcome this, their presentation of fact and argument, as can be amplified if a rehearing is granted.

POINT ONE

Ehlert Should Be Reviewed. Ehlert Explicitly Turned on a Factual Assumption That Now Appears to Be Without Basis-in-Fact.

This Court said in *Ehlert*:

> "We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims and that there

> thus exists no possibility that last crystallizers will find themselves without a forum in which to press their claims. *Our conclusion in this case is based upon that assurance.*" 91 S.Ct. 1319, 1324-1325. (Italics supplied)

A. There is overwhelming judicial pronouncement of "facts", in context, that shows this "assurance" does not comport with reality, among other things that late crystallizers discover that the military will not lend its ears to them and that they truly are without a forum.

B. Additionally, counsel attaches to this petition his affidavit that relates his own experience in this area of military conduct. It shows that other and most serious aberrations are frequently present, so frequently that counsel has no hesitancy in presenting this affidavit against the hearsay "assurance" based on nameless, faceless informants.

A.

There Is Overwhelming Judicial Opinion That the Factual Basis for This Court's Decision Is Unfounded and That the Language of Both the DoD 1300.6 and the AR 635-30 Is Uniformly Considered Plain, and That There Is No Ambiguity, and It Must Be Followed.

All judicial experience supports this claim of petitioners. If the Court intends to overrule all the courts below on this point as it has already done in one area of *Ehlert* [with respect to those judges who support the uncontrollableness of conscience in relation to the "crystallization" doctrine] it is respectfully suggested that an explicit pronouncement would be helpful, as in *Estep* v. *United States,* 327 U.S. 114 where the concurring opinion of Mr. Justice Frankfurter cataloged such an explicit repudiation of all Court of Appeals judges, but one (f. 1, pp. 138-139).

We present, in this portion of our petition, the determinations of over two dozen courts that support our thesis. They contradict the "assurance" passed on to this Court by the General Counsel of the Army.

What governs procedures in the Army? The ARs, the army regulations. How much weight should the Court give a letter from the General Counsel, based on reports to him, augmenting the record?

On a battlefield a recognized means of communication, in small units is "Pass the Word." If the General Counsel adds "I'm Passing the Word" then a little more weight is to be given his good offices. In army officer groups a well recognized means of communicating is "Pass the Word."

But what has been, and what *is*, the practice of the army in our context? A little history is desirable for the light it throws.

In conscientious objector matters, *before* the 1968 amendment to DoD 1300.6, Pass the Word resulted in sabotage to the AR 635-20 as is to be seen from counsel's attached affidavit, ¶7. The sabotage is why the 1968 amendment was made by the Secretary of Defense.

Since the record may be augmented by hearsay (from sources deemed reliable) we invite attention to our affidavit, attached to this petition. In the context of the argument being now made we quoted the following portion of the affidavit:

The Central Committee for Conscientious Objectors is an organization largely operated by Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious ob-

jector matters for a generation. In its publication "Handbook, for Conscientious Objectors, Eighth Edition, Third Printing, December, 1966, re DoD 1300.6, we read:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit." [82]

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the applications for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." [93]

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635-20 discharge were successful, Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

See counsel's affidavit of how this was done.

2. This sabotage, and the attendant outcry and pressure on the Pentagon brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

The following, recent court opinions emphasize our claim that the standards for discharge are governed by the plain and clear mandate of DoD 1300.6 and AR 635-20 *and also show* that for some reason, despite the amended DoD 1300.6, a considerable proportion of the military 03 hearings are still conducted (1) by officers *in the chain of command* [forbidden], (2) officers *not* knowledgeable [forbidden]; (3) and that the courts *uniformly* have used the plain standard of the DoD and the AR namely, that the conscientious objections must not have become "fixed" before the enlistment or induction ceremony.

[These cases are in alphabetical order; all italics is supplied]

Bachman v. *Bradley*, No. 2673 (W.D. Mo. Jan. 5, 1971), 3 SSLR 3948

> "And further, he states:
>
> > *'In the past months* of my active duty service, *I have recognized* that the realities of Army life and functions *are irrevocably in conflict* with my convictions and beliefs.' " [3948]

Baker v. *Laird*, 316 F.Supp. 1, N.D. Calif. (1970)

> ". . . *the army could deny* an application for discharge to one claiming to be a conscientious objector where his application reveals that the grounds and beliefs adduced in support thereof *are identical with those shown to have pre-existed* induction. . . ." [4]

United States ex rel. Barr v. *Resor*, No. 23815 (D.C. Cir. March 31, 1971) 3 SSLR 3999:8

> "*Barr never submitted a claim* for exemption from all military service *to his Selective Board. The Army Board's determination* that Barr's application was governed by paragraph 3b(2) *of AR 635-20 was* therefore without basis in fact and habeas corpus was properly granted." [3999:10]

Bates v. *Commander, etc.*, 413 F.2d 475 (1969) 1 Cir.

> "The Commandant's initial findings implicitly attack the petitioner's sincerity. But by holding that petitioner's present claim is inconsistent with his prior voluntary enlistment, the Commandant puts him in a 'hanged if he does, hanged if he doesn't' predicament. *Under DoD Directive 1300.6 IV B2, conscientious objection will not be considered unless it arose after* induction or enlistment. By the Commandant's reasoning, therefore, petitioner's claim cannot be considered if it arose prior to his enlistment and is evidence of insincerity if it arose afterwards. By the force of this logic, no member of the armed services could ever qualify as a conscientious objector." [478]

Bohnert v. *Faulkner*, 6 Cir., 438 F.2d 747 (1971)

> ". . . the Department of Defense provides for in-service discharge for conscientious objectors and requires that *such beliefs must have been acquired after* the enlistee entered the service, the timing of the request for discharge supports no more than an inference insufficient alone to constitute a basis in fact for doubting sincerity." [754]

Bortree v. *Resor*, D. of Col. 1970, 316 F.Supp. 93

> "In accordance with Army Regulation No. 635-20, the petitioner was interviewed by . . . Captain H. J. Nitko[1], an officer in the Army *who is knowledgeable* in policies and procedures relating to conscientious objector matters; [f. 1-1. 'Originally Captain Thomas M. Duszynski had interviewed the petitioner, but he was disqualified by Headquarters, Department of the Army, since he was in the petitioner's *chain-of-command.*']"

Bortree v. *Resor*, No. 24607 (D.C. Cir. Mar. 2, 1971) 3 SSLR 3788

> "Moreover, all indications are that *these officers did not have legally sufficient grounds for their recommendations.* Captain Nadwodny was *Bortree's unit*

commanding officer at Fort Dix and presumably had some contact with him, but he did not interview Bortree concerning his application for discharge." [3792]

United States ex rel. Brooks v. *Clifford,* 400 F.2d 700 (1969) 4th Cir.

"Indeed, the administrative procedures were devised for the very purpose of permitting the assertion of a claim of conscientious objection . . . *when the objection was not formulated until after* military service had begun." [707]

Cohen v. *Laird,* No. 69-1085 (D. S.C. June 26, 1970) 3 SSLR 3875

"Yet, it was *during this very period* of his basic training that he asserts *his convictions 'crystallized.'*" [3877]

Application of Corvell, 307 F.Supp. 209, N.D. Calif. (1969)

". . . *preclude granting discharges* to those . . . whose beliefs *pre-dated* but were not claimed prior to *active duty.*" [212]

Donham v. *Resor,* 2 Cir., 436 F.2d 751 (1971)

[On the requirement that the *Hearing Officer be knowledgeable* only one opinion is known to counsel *where the decision turned on this,* the Court finding that the Hearing Officer (a Colonel Gleason, at West Point) was *not knowledgeable in context.*] [754]

Goodwin v. *Laird,* 317 F.Supp. 863, N.D. Calif. (1970)

". . . he has adequately explained how and why *his beliefs became fixed after* entry to the service." [866]

Gordon v. *Resor,* S.D.N.Y. 323 F.Supp. 268 (1970)

"The armed forces naturally focus their attention on conscientious objection *crystallizing after induction,* leaving cases of earlier crystallization to the jurisdic-

tion of the Selective Service System. Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); United States v. Gearey, 368 F.2d 144, 149-150 (2d Cir. 1966); cert. denied 389 U.S. 959, 88 S.Ct. 335, 19 L.Ed.2d 368 (1967); DoD 1300.6, supra." [270]

Grossman v. *Fallwell*, No. 21429 (D. Md. Nov. 28, 1969) 3 SSLR 3977

"All three of the line officers then (Captain Smith, Captain Clark and Lieutenant Colonel Gettings) concurred in the following critical finding:

1. That petitioner was sincere,

2. That his convictions were motivated by religious beliefs, and

3. That *they became fixed after he went in the Army.* In the face of those conclusions reached by those Army officers who were closest to petitioner, and who had personal contact with him, it is indeed difficult to understand how the Review Board could make diametrically opposed findings." [3979]

United States ex rel. Healy v. *Beatty*, 424 F.2d 299, 5th Cir. (1970)

". . . the objection itself *must so manifest itself and not exist prior to entry on active duty.*" [302]

Helwick v. *Laird*, 5 Cir., 438 F.2d 959 (1971)

"Rather, the requirement of AR 635-20 (3) (b) is that the objection itself—the objection to participation in war in any form—*must become fixed only after entry into the Army.*" [966]

Keil v. *Seaman*, D. Md., 314 F.Supp. 816 (1970)

"Nor does this Court find any basis in fact for concluding that Keil's beliefs were not sincerely reached and held, *or that they did not become crystallized and fixed until after* his induction into the Army." [822]

Kepple v. *Laird*, 319 F.Supp. 1342, D. of C. (1970)

After citing AR 635-20, ¶2b on page 1344 the court concluded:

> "There is no showing that Kepple was under any compulsion to enlist in the Army and *no evidence* to overcome his claim that his convictions as to *conscientious objection had not matured at that time.*" [1345]

La Manna v. *Laird*, W.D. Tex., 322 F.Supp. 1289

> "The case of United States ex rel. Healy v. Beatty, supra, is in point. There it was argued that Healy's religious beliefs did not change and did not 'develop subsequent to entry into the active military service.' In fact, Pvt. Healy conceded this. However, this loses sight of the fact that 'the Regulations speak of the development of conscientious objection to the participation in war "in any form" *after induction*'; that is to say, participation in such noncombatant service as the Medical Corps." [1292]

Lovallo v. *Resor*, No. 71C48 (E.D. N.Y. Feb. 4, 1971), 3 SSLR 3874

> "His experiences in the Army, according to his statements, served to increase his adversion [sic] to violence and warfare. The personal contacts he made and the exposure to new points of view in the 26th Army Band had a further significant impact or his thinking: '. . . [G]radually *my conscience assumed a new depth of commitment* to the beliefs that I had long before internalized.' AHBCA-BA at p. 6. He became active in the Staten Island Peace Coalition which along with the reported events at Mylai further deepened his commitment." [3874]

McMahan v. *Laird*, S.D. Cal., 320 F.Supp. 485 (1970)

> *After citing* DoD 1300.6 and Bupersnote 1900 dated August 24, 1970 the court concluded "Clearly, petitioner has more than satisfied his burden. . ." [489]

O'Connor v. *McKean*, No. 70-93 N.D. Ala. (May 5, 1970), 3 SSLR 3498

> "Army Regulations 635-20 2.b. (1) provides for consideration of applications for discharge when the conscientious objection develops subsequent to entry upon active military service, but *specifically excludes from consideration* requests based solely on conscientious objection *which existed, but not claimed, prior* to induction. This same philosophy expressed in the comparable Selective Service Regulations has been approved by the Courts. Keene v. United States, supra; Nellons v. United States, 1 SSLR 3144, 399 F.2d 295 (5th Cir. 1968). There is no reason the Army Regulation should not be given the same treatment." [3500]

Polsky v. *Wetherill*, 438 F.2d 132, 10th Cir. (1971)

> ". . . Polsky was in fact a sincere conscientious objector but that his beliefs in such regard *had not crystallized during military service* but were existent at the time of Polsky's voluntary enlistment." [133]

Rabbito v. *Larson*, No. 70-572, N.D. Calif. (Aug. 19, 1970), 3 SSLR 321

> ". . . *hearing officer denied* petitioner's claim because his application is based solely on conscientious objection *which existed but was not claimed prior* to his coming into military. . . . Petitioner's application in some detail describes how and why his beliefs became fixed after entry to the service." [3212]

United States ex rel. Sheldon v. *O'Malley*, 420 F.2d 1344, C.A. D.C. (1969)

> "The general policy is stated to be that *consideration will be given* to separation requests '*when* such conscientious objection *develops subsequent to entry* into the active military service.'" [1345]

United States v. *Sigmon*, CM 416356 (Board of Review, U.S. Army, Jan. 2, 1968), 1 SSLR 3054

> "The only factual questions . . . (1) Did the appellant actually attempt to apply for a discharge; and (2) Did his beliefs arise *subsequent* to his entry on active duty." [3055]

Stehling v. *Casey*, No. 70-C-104 (W.D. Wis. Jan. 22, 1971), 3 SSLR 3912

> "He stated that his views *had not begun to crystallize until* he had *been activated* as a National Guard member for riot duty on the University of Wisconsin campus. He stated that he was a Roman Catholic at the time of the application, that he had been raised a Catholic and had attended 'a seminary for three years,' but that 'the full impact of the [Christian] concept' of the brotherhood of man had 'never really dawned' on him until the guard duty during the campus disturbance. He referred to a sermon on brotherhood and to certain experiences during his attendance at a National Guard summer camp. He said that 'attending the seminary for three years deepened my religious beliefs,' but that his conscientious objection had not solidified until years later, shortly before the filing of his application." [3912]

Talford v. *Seaman*, 306 F.Supp. 941, D. Md. (1969)

> ". . . he did not realize the incompatability of his religious beliefs and war in any form, until after his entry into the service."
>
> * * *
>
> "There remains the *issue* of whether Talford's views *became fixed before entry* into the service." [945]

POINT TWO

The Army Can't Be Counted on to Follow the Guidelines of Its General Counsel.

Army practice, in context, is often far different from even the printed regulations; also, relief thereafter encounters built-in, unnecessary dead-ends.

1. "Knowledgeable" Hearing Officers [a requirement of DoD 1300.6 and repeated in AR 635-20] are not always assigned to conduct the "03 Hearings." See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "A", first several pages.

2. Administrative relief opportunity after the 03 Hearing is almost a mockery. Court relief from arbitrary decision is unnecessarily hazardous because records turn out to be inadequate-to-poor.

a. "Reporting" must be done at the expense of the applicant, if and when permitted and tape recording is now prohibited. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "A", next several pages.

b. Completely favorable reports of the "03 Hearing Officer" have been arbitrarily rejected by superior officers who never saw the applicant. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "A", pages 5 and 6.

c. On the other hand relief opportunity from the Selective Service System denials is readily available, and is granted when indicated. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "A", pages 7 and 8.

Assuming it is concluded that the above listed arguments are considered sufficiently supported by the affidavit and by the reported cases we believe it follows either

that the military remedy relief route is devoid of fairness to inductees, or, in the alternative that a no-man's land appears to exist. Therefore a rehearing is now justified on the proposition that the civil court remedies should be left available to late-filing conscientious objectors.

POINT THREE

Other Grounds and Some Unique to Individual Petitioners.

After the decisions below in all petitioners' appeals, some of the avalanche of case law that the last 15 months has witnessed either (1) crystallized in several areas, favorable to contentions of these petitioners or (2) is approaching such a crystallization, meaning that this Court itself now has pending some of such matters for decision. Perhaps remand is the solution.

Evans, No. 356:

This petitioner, and nearly all the others have the following to aid them:

One: It has become established in their jurisdiction that where a Selective Service registrant's prima facie claim for a new classification is rejected, the local and/or appeal board must state a valid reason. *U. S.* v. *French*, 429 F.2d 391 (July 6, 1970) 9th Cir.

Evans' complete Selective Service file was the government's sole evidence. It, like a considerable percentage of files of that period, shows that no explicit reason was given for the rejection of his claims [Gov. Ex. p. 104].

Assuming that the government makes no attempt to controvert our following statement (1) that one or more prima facie claims for deferred classifications were made and (2) that no valid reason was given for rejection we urge that his petition, and that of the others, presents plain

error and that a reversal is required. Rule 52 (b) Fed. C.Cr.P., Cf. *Howze* v. *United States*, 9 Cir. (1969), 409 F.2d 27, 28.

Two: It has become established that a registrant's claim, otherwise prima facie, is not outside the law because some, or all, of his bases for conscientious objection are not religious. *Welsh* v. *United States*, 90 S.Ct. 1792 (June 15, 1970).

At Evans' Appearance Before Local Board, on July 11, 1967 no reason for rejecting his claim was stated; the inference, from the questions asked (Sheet 104 of his Selective Service file is the board clerk's account) was that he wasn't considered religious.

Three: Today, certain other defenses are approaching a national decision.

a. Evans' petition involves the right to counsel at the agency proceedings, and especially at hearings.

   This Court, in *Weller* v. *United States*, No. 77, October Term, 1970 appears to consider this a good point, by its remand

b. Evans' petition involves the right to witnesses at hearings. This point is present for, at his above-referred to July 11, 1967 hearing the board stated his witness could not come in.

Posner, No. 151:

What was said above, for Evans, applies to this petitioner, too. Additionally,

1. His local board clearly inferred it did not consider him "religious" [Ex. 183-211, their account of the meeting with the board]

   Welsh, supra changed the law on this, while Dr. Posner's case was pending in this Court.

2. *Mulloy* v. *United States,* 398 U.S. 410 (1970), re reopening applies.

Flesch, No. 145:

This petitioner, additionally, has a *de facto* reopening situation; his claim was "reviewed" [Ex. 36] *Miller* v. *United States,* 9 Cir., 1967, 388 F.2d 973.

Harris, No. 142:

This petitioner, like some of the others, was prejudiced by the "no counsel permitted" point he raised in ¶ numbered 10 of his Motion for Judgment of Acquittal.

Bender, No. 284 and *Brossard,* No. 141:

These petitioners have all the above points, raised by their individual Motions for Judgment of Acquittal.

Dillon, No. 149:

In addition to the above this man's unique-to-him no-physical-inspection point is now aided by *United States* v. *Brown,* 3 SSLR 3794, 9 Cir., Feb. 17, 1971.

We believe we have disposed of the *validity* of the "assurance" given by the Army's General Counsel in Point One and Point Two, above.

A.

We now present facts and argument to remove, what we respectfully assert, is a related misconception in the Court's opinion, one stated in the same paragraph as its explicit reliance on the Army General Counsel's "assurance." The opinion says:

> "As for the absence of any no man's land, the pertinent military regulations are somewhat inconsistent in their phrasing, perhaps because of the sharp division among the court of appeals."

First, we argue that to the military there is nothing inconsistent in the AR's phrasing.[1]

We read these subsections of the regulation, as the military have always read them as meaning:

1. Sub (a) says "consideration will be given. . ." [only] "when such objection develops subsequent to entry. . ."

2. Sub (b) says: A man who didn't timely present existing conscientious objector belief to his draft board is S.O.L., the army's oral characterization. We translate this S.O.L. expression to mean: Surely out of Luck.

Second, the synopses of the 30 court opinions, *supra,* involving over two score judges plus our own affidavit show the military practice and give added support to our "First" argument, immediately above, that no ambiguity exists.

B.

A parallel consideration of the last two versions of the afore-quoted portion of AR 635-20 shows that the Army does try to pay lip service to this Court's pronouncements.

Attention is invited to the AR 635-20 dated 31 July, 1970. It is headed:

---

1. The AR's provisions we refer to are set forth in the opinion's footnote 10. Subparagraphs a and b of ¶3, we submit, are merely repetitious. We italicize to emphasize our reading.

"10. See Army Regulation No. 635-20, ¶3:

'a. *Consideration will be given* to requests for separation based on bona fide conscientious objection to participation in war, in any form, *when* such objection *develops subsequent* to entry into the military service.' "

PERSONNEL SEPARATIONS
CONSCIENTIOUS OBJECTION

Effective 15 August 1970

This revision is necessary to reflect the recent change from "religious beliefs" as the basis for requesting separation from the service for conscientious objection to "deeply held moral, ethical or religious beliefs."

This heading is obviously a prompt and good start toward implementation of *Welsh* v. *United States*, 90 S.Ct. 1792 (June 15, 1970) *but*, when we turn the first page for details under ¶ "4 . . . Procedure. . .

"(1) General Information. . ." [we come to]

"(2) *Religious Training or beliefs held.*

(*a*) A description of the nature of belief which is the basis of claim.

(*b*) Explain how, when, and from whom or from what source the applicant received the training and acquired the belief which is the basis of claim."

We submit this demand for details [with the word *"religious"* in the heading for the sub-paragraphs] is coercive and misleading, and in substance gives the anxious applicant for separation the same Procrustean bed as did the pre-*Welsh* version of the AR, dated 27 May 1968.

Perhaps the military may change the AR to conform to *Ehlert* (even as the 1968 version did belatedly bow to *Seeger* v. *United States*, 85 S.Ct. 850 (1965)) by omitting (a) of (2) [which had read "Do you believe in a Supreme Being"] and substituting the current question "(2) (a) A description of the . . . ."

We submit that conjectures about the future are out of place.

We call the current AR 635-20 coercive and misleading because *Welsh removed* a showing of "religious" training and belief as a necessity for qualifying whereas the current AR certainly implies that the nature of the belief, and its source, better be religious, or else. . .

Finally, we believe that no conscientious objector should be expected to go into the Army to get out. We have heard of no one, since the prescient and desperate Professor Billings,[2] who could allow himself to follow such a procedure.

CONCLUSION

1. The Selective Service System affords a fairer remedy to selectees than the military and is a better equipped administrative agency for determining conscientious objections.

2. Also, until the military regulations are changed to conform to the recent expression of the army's General Counsel there has existed, and presently exists, a no-man's-land for late crystallizing selectees.

3. A rehearing should be granted, or perhaps some or all should be remanded for consideration in the light of the decisions of the last fifteen months.

Respectfully,

J. B. TIETZ
Attorney for Petitioners

DATED: June 7, 1971

2. *Billings* v. *Truesdell*, 321 U.S. 542 (1944).

CERTIFICATE OF COUNSEL

This Petition for Rehearing is filed in good faith and not for the purpose of delay.

J. B. TIETZ
Attorney for Petitioners

APPENDIX A

AFFIDAVIT OF COUNSEL
IN SUPPORT OF
PETITION FOR REHEARING

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. B. Tietz, being first duly sworn, states:

1. I am counsel of record in this captioned case and was counsel for petitioners in all courts below, trial and appellate.

2. I started practicing law in Ohio, in 1926; and, at all times since 1944 have practiced in my present office at 257 South Spring Street, Los Angeles, California.

3. Since 1944, and for 25 of the last 27 years I have specialized in draft and related military problems, nearly all of these clients claiming conscientious objections to war and to military training.

4. During this 25 year period I have followed the procedures of the eleven armed services (the four regular, and the seven reserve and guard organizations) as carefully as possible, on matters concerning my clients.

5. In 1968 DoD 1300.6[1] was amended in two chief particulars: (1) to take away the initial decision on a man's conscientious objections from his immediate commanding officer and (2) to afford him the opportunity to have private counsel: ". . . The applicant will then be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 03, or higher, who is knowledgeable in policies and procedures

1. The Department of Defense Directive referred to in *Ehlert*.

relating to conscientious objector matters. The designated hearing officer will not be an officer in the applicant's chain of command."

Prior to this amendment, and from the beginning of the Vietnam armed involvement reports came to me from many military installations that DoD 1300.6 was being entirely disregarded, as follows: "An officer took me aside and said 'I'm giving you a friendly tip: the policy here is to grant no c.o. discharges. You are up against a stone wall.' I learned he was telling me the truth."

From 1968 to date my aid to in-service men has included appearing with them at such hearings, ones now universally termed "the 03 hearing."

6. Samples of my experiences are:

a. Most recently, on April 20, 1971, I appeared with and on behalf of Dr. Ralph Hannah at the Armory in Pasadena, California. The hearing officer was an infantry colonel[2] and the four other officers present were either infantry or other non-legal (Judge Advocate General) men, hereinafter referred to in this affidavit as JAG officers. Each was in uniform like the Hearing Officer.

The Hearing Officer was directly on the applicant's chain of command. He answered one of my questions, as follows: "No, this is the first such hearing I have attended."

I was forbidden to use my *tape recorder*[3] and was told, "No, you will not get a *copy of my report.*"[3]

b. On April 22, 1971, I was at Fort Ord, Fort Ord, California with and on behalf of PFC Martin Rush, a "Native American" that is an Indian from the historically peaceful Pima tribe.

2. Underscoring denotes a violation of the DoD.

3. Italicizing denotes a grave unfairness.

There I encountered three[4] young JAG officers all sitting as a panel and was told "No, *you cannot use the tape recorder.*"[3]

c. On December 2, 1970 I was at a lawyer's office in Pasadena, California with Lt. Max Bothwell.

The Hearing Officer was an infantry colonel: the man who had appointed him was a colonel in chemical warfare; both were in dress uniform, as was an infantry major. All were in applicant's organization and/or chain of command.

I was *forbidden to use my tape recorder* (it being explained "This would inhibit freedom of expression."); I was told "You *will not get a copy* of my report."

This was the most extraordinary one I have attended in that 95% of all the hearing officer said was in this vein: "You are a most intelligent young man; the army needs you; you can do much for the service if you stay in."

d. I have attended hearings (all since the 1968 amendment, of course) where situations comparable to the above were present such as one at Fort Lewis, Fort Lewis, Washington, where the hearing officer was an infantry major and forbade the use of a tape recorder, one at the Marine Aircraft Wing near Santa Ana, California where the Marine Corps major was a non-legal officer and in the chain of command but did permit recording.

e. Where the Hearing Officer is favorably impressed, and so declares in a detailed report (with corroborating support in the form of many unimpeachable letters) the applicant still can encounter an abrupt and arbitrary denial of relief by a superior officer, a man who never saw him. See cases cited in Point I, above.

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4. Underscoring denotes a violation of the DoD.

> Where relief is thereafter obtained at the trial level [by a persistent soldier and one able to get a lawyer's aid] such cases are generally unreported. For example Bernie Reynolds had a most favorable Hearing Officer report, and a dozen letters from priests and nuns but had to file a petition, in San Francisco, to get his writ of habeas corpus. No. 51576 N.D. Cal.

7. Concerning the sabotage of the initial version of DoD 1300.6. Several clients, from different military installations informed me, during the period beginning in 1966 up to the middle of 1968: An officer said to me I'll give you a tip. You are in a blind alley. The policy here is to turn down all these c.o. applicants.

8. The Central Committee for Conscientious Objectors is an organization largely of Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious objector matters for a generation. In its publication "Handbook, for Conscientious Objectors, Eighth Edition, Third Printing, December, 1966, on page 82 re DoD 1300.6:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit."

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

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Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635 20 discharge were successful Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

2. This sabotage, and the attendant outcry and pressure brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

/s/ J. B. Tietz
J. B. Tietz,
Attorney for Petitioners

Sworn to before me and subscribed in my presence this 18th day of May, 1971.

/s/ William A. Leeds
(Seal) Notary Public in and for the County of Los Angeles, State of California

SUPPLEMENTAL AFFIDAVIT.

This supplemental affidavit is to further show that the current practice of the military is to proceed without legal advice and, in consequence, to ignore the many court decisions interpreting the DoD 1300.6 and its progeny, in this instance the controlling Marine Corps Order, termed M.C.O. 1306.16B.

On May 22, 1971 affiant represented Pfc Elmer Ray Kent at his 03 Hearing at the Marine Air Base, Yuma, Arizona.

The Hearing Officer was a non-legal man (an aviator); also, he was in the chain of command. The "non-legal but aviator fact" was established by the insignia I observed on his lapels and by the way he signed documents that are now part of Kent's conscientious objector application for separation; the "chain of command" fact was his statement to me during the hearing.

The Hearing Officer also stated to me he would "use the chaplain's report and recommendation and the psychiatrist's report and reasoning."

> [This is not permissible: In the case of U.S. ex rel.-Greenwood v. Resor (4th Cir., No. 15,392, April 12, 1971), the Court pointed out that AR 135-25 para 7b, expressly directs that neither the chaplain nor the psychiatrist should make a recommendation for approval or disapproval of an application for CO discharge. Thus the Court could "give no weight to the recommendation of either officer and we disregard whatever weight they were given by the Review Board."]

Also, he stated he would use, as his standard for judgment, Selective Service Systems Dr. Tarr's standard of "training with rigor." This standard is false; there is no justification in the Act or in *Welsh* for this. It was issued, by the Director [LBM 107 6/July '70 Tarr] right after he was upset by the *Welsh* decision of the Court, June 15, 1970.

We were originally told that this hearing would be at the El Toro Marine Corps Base, a large installation with a legal department. No explanation was given for the change, or why a legal officer wasn't present.

On May 27, 1971 I received a telephone call from Kent and he read me the rejection recommendation of the 03 Hearing Officer: it was based on the incongruity of a man claiming conscientious objection to war when the record showed he had been convicted of possessing marihuana. It incorrectly stated he had been selling it, incorrect in other respects and most important, this and all other items were not mentioned at the 03 Hearing and we didn't know they were being considered. Copy of the Hearing Officer's report is attached. Copy of Kent's letter to affiant is also attached. Attention is invited to Kent's statement that the Hearing Officer interviewed him *before* the Hearing, in absence of counsel, and in defiance of the regulation and fairness. We refer to ¶5 of Kent's letter to affiant:

> "(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing."

An affidavit from Kent will be procured, one rebutting the report, if and when further pleadings are in order.

On May 29, 1971 the text of the report and recommendation of disapproval came. It was based on "insincerity". If supported by "demeanor" or by recited, pertinent facts the report would be on solid ground.

There is no mention of demeanor by word or in inference and the facts were immaterial ones such as (1) a conviction on a marihuana charge [partly incorrect]; (2) paper work late, including his letters of reference and, most important *none* of these items were related to us at the hearing and when I questioned the Hearing Officer at the conclusion of it whether he believed the applicant had been frank the officer said "Yes".

I had started the proceeding with his permission, and on my statement "We have the burden and, with the Hearing Officer's approval I will proceed with our case", and, after I covered everything, the officer asked almost no questions.

At the close he said, "You have covered everything" and then went into some generalities.

/s/ J. B. Tietz
J. B. Tietz

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Sworn to before me and subscribed in my presence by J. B. TIETZ, personally know to me, on May 31, 1971.

/s/ Edward Raiden
(Seal) Notary Public in and for the County of Los Angeles, State of California.

A9

COPY TO KENT

1:JTi:hr
1330
25 May 71

SECOND ENDORSEMENT on Private Elmer R. KENT's ltr 1:JBM:jcp over 1330 dtd 19 May 71

From: Captain James B. MCKENNEY (SSN 425 78 69 65) MSN 09 54 43/1501, USMC

To: Commanding Officer, Marine Training Squadron 103

Subj: Conscientious Objector Status; request for

1. Returned.

2. It is recommended that Private KENT's application be disapproved.

3. On 23 May 1971, Marine Corps Air Station, Yuma, Arizona, a hearing was conducted with Private Elmer R. KENT and Mr. J. B. Tietz (Attorney at law) present. Private Kent was afforded the opportunity to support his application.

4. It is felt that Private KENT's application is insincere. His application comes at a time when he is awaiting trial by Special Court Martial for an eleven month unauthorized absence. He was arrested 1 October 1970 by civilian authorities for possession of marijuana, selling marijuana, and possession of dangerous drugs. He was tried and convicted on 23 December 1970, served a ninty day sentence and is on three years probation. He stated that he had planned to return and apply for a conscientious objector status but was arrested. Although he claims to have started on the paper work prior to arrest, all his letters of reference are dated after 20 November 1970. It is felt that

while in civilian custody, he decided to apply for this status as a means of evading court martial.

5. Private KENT professes to believe that everyone is God and all people should love each other. His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro. Also he stated that he can no longer perform any job in the military.

6. The Chaplain and Psychiatrist also believe that KENT's application is insincere and a means of getting out of military service.

7. It is further recommended that the Convening Authority proceed with the trial of Private KENT.

J. B. MCKENNEY

27 May 1971

Mr. Tietz,

Here's the copy. I want to go to court with this. I'm confident that I'll be able to pay you your fee. I'm already working on that now.

There are some things which bother me about this copy.

(1) He states that he feels my application is insincere He said at the hearing that he felt I was sincere.

(2) He brings up my civil case stating that I was arersted for Pocess. Maraj., Sales of Maraj. and pocess dangerous drugs. There was no sales involved—that was an intent to sell charge—besides it was dropped and so was the pocess dangerous drugs. I feel he's slighting me here and building ground for prejudice against me.

(3) A remark about my claiming to have started my application prior to arrest. I have my receipts and things which you gave me at the time I first came to visit you.

(4) I was not tried and convicted on that civil charge. I was black mailed and coerced into a plea of guilty.

(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing.

(6) "His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro." I did not derive my belief from that. That was only a conformation or understanding. Sort of like the key that opened the door. Also I don't believe I said rainy morning because it was at night and I don't think it was raining. I believe I stated that it occured about the the same time of year as when Calif had that storm which caused rain for 13 days straight.

That's about all I can think of right now. When you reply can you give me some idea of the length of time—(like a tenative time table) for this proceeding. That will give me a frame work to work with in on financing this. I believe I can collect the money soon.

Thank You

/s/ Elmer R. Kent

P.S. They were supposed to have my hearing at El Torro. There was supposed to be a Colonel as the 0-3 and some other people were going to sit in. I learned this from Capt. Suciu my military defense counsel. He doesn't know why it was cancled. Perhaps a mistake was made. I'll check.